(3)

IN THE

OF THE UNITED STATES

October Term, 1983

[redacted] FEDERAL SAVINGS AND LOAN
[redacted] OF BISMARCK,

Petitioner

[redacted] AND TOM A. BRIGHAM, TRUSTEE

Respondents

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Alan Grindberg
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Counsel for Respondent,
Tom A. Brigham

BEST AVAILABLE COPY

12 pp

— United States Supreme Cou-t

First Federal Savings and Loan of
Bismarck

v. No. _____

Theodore George Hulm and Tom A.
Brigham, Trustee

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, Tom A. Brigham, Trustee, being first duly sworn, depose and say that I am the respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to print its response, I state that because of poverty the estate is unable to pay the costs of said proceeding or to give security therefor; that I believe the estate is entitled to respond, and that the issues which it desire to present are in opposition to petition for a writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

Respondant is Trustee of an estate in bankruptcy and appears in that capacity. There are no funds in the bankrupt estate for management.

Tom A. Brigham, Trustee

Subscribed and sworn to before me this 9th day of October, 1984.

Let the applicant proceed without printed brief in response.

Judge

ALAN GRINDBERG
ATTORNEY-AT-LAW
STEELE, N. DAK.

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in the

United States Supreme Court

First Federal Savings and Loan of Bismarck

Petitioner,

No. _____

vs.

Theodore George Hulm and Tom A. Brigham, Trustee,

Respondents.

Motion For Leave To Proceed

In Forma Pauperis

Comes now the respondent Tom A. Brigham, Trustee, and moves the Court for an Order granting permission to proceed in this matter with typewritten response. This Motion is based on the files and records herein and on the attached affidavit.

Dated and signed this 9th day of October, 1984.

Alan Grindberg, Attorney for
Tom A. Brigham
P. O. Box 9
Steele, North Dakota 58482
(701) 475-2229

ALAN GRINDBERG
ATTORNEY-AT-LAW
STEELE, N. DAK.

IN THE

SUPREME COURT OF THE UNITED STATES

In re: First Federal Savings and Loan Association of Bismarck, Petitioner,	)	
-vs-	)	AFFIDAVIT OF MAILING
Theodore George Hulm and Tom A. Brigham, Respondents.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF KIDDER)

Jolene Dewitz, being first duly sworn on oath deposes and says that she is a citizen of the United States, over the age of eighteen years, and is not a party to the above entitled matter.

That on the 10th day of October, 1984, this affiant deposited in the mailing department of the United States Post Office at Steele, North Dakota, a true and correct copy of the following document filed in the above captioned action:

NOTICE OF APPEARANCE

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

That the copies of the above document were securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

Richard G. Carver
Vinje Law Firm
523 North Fourth Street
Bismarck, North Dakota 58501

James P. Rausch
Attorney at Law
P. O. Box 1413
Bismarck, North Dakota 58502

To the best of this affiant's knowledge, information and belief, such address as given above is the actual post office address of the party intended to be so served. That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Dated and signed this 10th day of October, 1984.

Jolene Dewitz

Subscribed and sworn to before me this 10th day of October, 1984.

Barbara Heaton
Barbara Heaton, Notary Public
Kidder County, North Dakota
My commission expires: 4-26-88

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals for the Eighth Circuit in this matter was erroneous and in conflict with the position taken by the Court of Appeals for the Ninth Circuit in that the decision below provides that for purposes of 11 U.S.C.§548, the date the transfer of the debtor's interest in property occurred at the time of the mortgage foreclosure sale rather than the date the mortgage was perfected under applicable state law?

2. Whether the Eighth Circuit Court of Appeals in this case erred when it refused to adopt the position taken by the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals by holding that the bid of the mortgagee at a regularly conducted mortgage foreclosure sale is to be presumed the "reasonably equivalent value" of the debtor's interest in the property in the absence of fraud or collusion for purposes of the fraudulent transfer section of the Bankruptcy Code, rather then requiring the mortgagee to conduct an evidentiary hearing on the value of the property at the time of said sale which was the decision of the Court below?

Table of Authorities

Cases

In re Madrid, 725 F2d 1197
In re Madrid, 21 BR 424

Statutes
11 USC §548

Reports
H. R. Rep No 595, 95th Cong. 1st Session 177-179 (1977)

Opinions Below
The petition contains all of the opinions below as follows:

Eighth Circuit Court of Appeals	p. A- 1
District Court	p. A-11
Bankruptcy Court	p. A-19

REASONS FOR NOT GRANTING THE WRIT

I. The decision of the Eight Circuit in this case does not conflict with the Ninth Circuit's decision in In Re Madrid (725 F2d 1197)

To compare the two decisions here is the equivalent of comparing apples and oranges. The only similarity is that they both were determined under 11 USC §548. The Madrid decision was based on a deed of trust, the Hulm decision is based on a mortgage. The Madrid foreclosure was non-judicial, the Hulm decision was judicial. Madrid's rights were determined under Nevada law, Hulm under North Dakota law.

With these many difference, it is impossible to say that the Circuits are in conflict. It is necessary that the application of 11 USC §548 to a much more similar set of facts be decided before it is possible to say that the Circuits are in conflict.

Even if it were felt that a difference could be determined to exist here, the matter is not ripe for review by the Supreme Court. We have only had decisions from three Circuits, and any differences that may exist do not reach the level necessary to require review. The matter must be more clearly in conflict and that conflict should be more extensive before it is worthy of a review at this level.

In addition, the decision which should be reviewed is the incorrect decision and that is not the decision of the Eighth Circuit in this case. Section 548 transfer occurs when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but

if such transfer is not perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition." 11 USC §548(d)(1) Very clearly, a purchaser from Mr. Hulm, could have obtained an interest superior to that of First Federal Savings and Loan up to date of the sheriff's deed. Hulm, or a bona fide purchaser from him, could, up to the issuance of that deed, have obtained a clear fee title merely by paying off the mortgage. Such an interest would clearly be a superior interest in the property to any other interest. This, the Eighth Circuit was correct in its determination that the transfer occurred for purposes of 11 USC §548, when the sheriff's deed issued.

If the transaction sought to be avoided was the lien created by the mortgage, the argument of First Federal Savings and Loan would have some logic to it, but as it is, it is difficult to see how that position can be plausibly maintained.

II. The correct rule of law is not that a bid of a mortgagee at a foreclosure is reasonable equivalent value, per se.

A holding such as that made by the Ninth Circuit Bankruptcy Panel in In Re Madrid (21 BR 424) is contrary to logic and fairness and only serves to frustrate the basic principles and purposes behind the bankruptcy act. If we assume that a Savings and Loan Association was owed $60,000 on a house worth $120,000, is it equitable to the unsecured creditors that they take nothing while the secured association be allowed to take the property for its bid at the foreclosure sale and resell, not only recouping in full the money owed it, but also securing to itself an undeserved windfall of $60,000? Obviously the answer is no.

Having had a preferred position as a secured creditor from the outset, it should be sufficient for the Savings and Loan Association to be made whole, and equity should require that the proceeds from the debtor's equity in the property be used to reduce the losses they will be taking. Also, one of the basic purposes of bankruptcy is to provide for a fair and orderly dissolution of a bankrupt debtor.

", by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter "race of diligence of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section--that of equality of distribution."
H.R. Rep. No. 595, 95th Cong., 1st Session 177-179 (1977).
(emphasis supplied)

Circumstances such as those hypothesized create a result in direct violation of these principles. While First Federal is paid off at 100 cents on the dollar, and acquires a huge unearned windfall, unsecured creditors will go without any payment. It is just this result that the Bankruptcy Code seeks to avoid.

If, in fact, a foreclosure sale were an "open-market" sale where all the forces of the housing market came into play, there

may be some justification in allowing such a sale to determine "reasonable equivalent value". However, as the Court is fully aware, at almost all foreclosure sales the only buyer present is the holder of the foreclosed mortgage lien. There is no competition. A price developed at such a sale has no relationship to the real value of the property.

First Federal argues that the decision in Hulm will, if allowed to stand, have a chilling effect on the real estate mortgage market. This is difficult to see, also. Mortgages are made, presumably, on the expectation that the lender will get its money back, together with an agreed rate of interest, not, hopefully, on the expectation that the lender will be the beneficiary of an unmerited windfall. Surely, the Savings and Loans Association can develop a procedure for handling these situations so that they are protected. The presence of this suit has not interfered with the prompt repossession and resale of the property in question.

If the Savings and Loan Associations are being hindered in loan management by 11 USC §548, it is to Congress that they should address their petition for relief. The mandate of the statute is clear and there has been no claim made that it is unconstitutional in any way.

SUMMARY

The petition should be rejected. There is no clear conflict between Circuits, and only three of the Circuits have thus far ruled on the matter. A review at this time would be premature.

The decision of the Eighth Circuit in this case is in accord with both the spirit and the letter of the law. A result such as that sought by the Savings and Loan would unjustly enrich a protected secured creditor at the expense of the unsecured creditor, a result clearly contrary to both that spirit of letter.

Therefore, the Trustee respectfully requests that the petition for writ of certiorari in this matter be denied.

Dated and signed this 9th day of October, 1984.

Alan Grindberg, Counsel for
Respondent, Tom A. Brigham
P. O. Box 9
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